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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-2027

FRANCES M. ANDERSON, Individually,
and as Legal Representative of the
Estate of PAUL H. ANDERSON

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent

No._____

HERBERT E. AND MARY C. WIESE

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of

certiorari issue to review the judgment

of the United States Court of Appeals for the Fifth Circuit entered in this case on March 24, 1980.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 614 F2d 535.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on March 24, 1980, and copies thereof are appended to this petition in the Appendix at Page i. The jurisdiction of this court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

The question involved in this appeal is whether amounts received by Petitioners during 1971 from the sale of H. E. Wiese, Inc. stock to the Pace Company constitute amounts received pursuant to a binding contract or an

irrevocable option entered into on or before October 9, 1969. If so, the alternative tax rate of twenty-five (25%) percent provided by Section 1201 of the Internal Revenue Code of 1954 applies to the capital gain realized by Petitioners upon sale rather than the rate of thirty-two and one-half (32-1/2%) percent.

STATUTES & REGULATIONS INVOLVED

The complete text of 26 USC 1201 and Treasury Regulation Section 1.1201-1 (b)(2) is contained in the Appendix at pp.3 & 4.

STATEMENT

Petitioners, Herbert E. Wiese and Mary C. Wiese, husband and wife, filed joint federal income tax returns for the calendar year 1971. Petitioner, Frances M. Anderson, and her deceased husband, Paul H. Anderson, who died during the pendency of the appeal of the case, also filed joint federal income

tax returns for the calendar year 1971. Both couples resided in Baton Rouge, Louisiana, at the time they filed their federal income tax returns for the calendar year 1971 and the petition to the United States Tax Court.

On March 8, 1974, the Commissioner of Internal Revenue mailed notice of deficiency to Mr. and Mrs. Wiese and Mr. and Mrs. Anderson. On September 3, 1974, taxpayers Wiese and Anderson filed with the United States Tax Court petitions for a redetermination of the deficiencies set forth by the Commissioner in his notice of deficiency. Pursuant to joint motion of the taxpayers and the Commissioner, the cases were consolidated for trial, briefing and opinion.

The trial was held before the Honorable Arnold Raum, Judge, in New Orleans, Louisiana, on February 2, 3 and 4, 1976, following which the Court

requested the parties to file simultaneous original briefs on or before April 21, 1976. The evidence consists of the pleadings, a written stipulation of facts and two supplemental stipulations of facts with exhibits attached thereto and the oral testimony adduced at trial.

On November 29, 1976, the Tax Court entered a Memorandum Findings of Fact and Opinion, Herbert E. Wiese and Mary C. Wiese v. Commissioner of Internal Revenue, T.C. Memo 1976-362 (1976) and Paul H. Anderson and Frances M. Anderson v. Commissioner of Internal Revenue, T.C. Memo 1976-362 (1976), which decision sets forth the deficiencies in income taxes due from the taxpayers for the calendar year 1971, as follows:

Wiese:	$68,709.00
Anderson:	$64,123.12

Taxpayers appealed these adverse decisions to the United States Court

of Appeals for the Fifth Circuit. After receiving briefs and hearing oral argument thereon, the Court affirmed the decision of the Tax Court, rendering a per curiam opinion.

The relevant facts of this controversy are presented as follows:

H. E. Wiese, Inc. ("Wiese, Inc.") a Louisiana Corporation, at all times pertinent hereto, was engaged, principally in the southern Louisiana area, in the construction of industrial plants for petroleum refining and petro-chemical and chemical manufacturing. In addition, Wiese, Inc., was engaged in contract maintenance for industrial plants located in the same area. After March 27, 1969, Wiese, Inc., established an engineering department in connection with its construction and maintenance operations.

On or before March 27, 1969, Petitioner Herbert E. Wiese was president of, and Paul H. Anderson was vice-president of, Wiese, Inc. Both men were members of its board of directors.

On or before March 27, 1969, the stock of Wiese, Inc. was owned by the persons in the proportions shown in the following table:

Owner	Shares	Percent
H.E.Wiese	2,350	31.34
Wiese children and spouses	1,400	18.66
Paul H. & Frances M. Anderson	2,625	35.00
A. K. McInnis	1,125	15.00
Total:	$7,500	$100.00

The Pace Company Consultants and Engineers ("Pace"), a Texas corporation, at all times pertinent hereto, provided a wide range of engineering and construction services to the petroleum, refining, petro-chemical and chemical industries.

During 1968, Pace was interested in the acquisition of Wiese, Inc. In August of 1968, W. D. Broyles, a vice-president of Pace, moved to Baton Rouge to pursue negotiations for the acquisition of Wiese, Inc., and later to supervise the integration of the two companies as is more fully described below.

The Timetable for Wiese Acquisition and Public Offering indicates that the Board of Directors of Pace, on December 23, 1968, authorized its officers to negotiate an agreement to purchase the stock of the major Wiese, Inc. shareholders. The Directors also authorized adjustments to the capital structure of Pace in contemplation of the acquisition of the Wiese, Inc. stock and negotiation of a contract for the public offering of Pace common stock.

The timetable further provided that the Wiese, Inc. directors were to furnish financial data to Pace for its public offering, authorize a certified public audit of Wiese, Inc. as of December 31, 1968 and the Wiese, Inc. shareholders were to execute a stock purchase agreement, notify Pace of their willingness to accept the security offered by Pace with regard to the acquisition indebtedness and to execute assignments of their Wiese, Inc. stock to Pace.

On March 27, 1969, the Wiese, Inc. shareholders and Pace officers reduced to writing their stock purchase agreement binding the taxpayers herein to sell their stock to Pace. The selling price was payable partly in cash, partly in Pace stock and party in a Pace nonnegotiable promissory note. The cash payment and amortization of the note

was to be funded through a public offering of Pace stock. This agreement constituted the legal, valid and binding agreement of the taxpayers enforceable in accordance with its terms and contained the following provision:

> "Pace and the Sellers have accordingly agreed that at the completion of the Closing described herein, the Cash Consideration, Stock Consideration, Note Consideration, Company stock, documents and Instruments executed and delivered pursuant to the terms of this agreement will be delivered to the City National Bank of Baton Rouge, Baton Rouge, Louisiana, hereinafter called 'Trustee', to be held by it in trust until the aforementioned public offering of Pace's stock is consummated, or until 135 days after Closing Date, or such later time agreed to by the parties, whichever event or date occurs first, which date is hereinafter referred to as the 'Release Date'. The Company's stock, upon its delivery to the Trustee, shall be registered in the Trustee's name. The Trustee at the time it delivers the stock to the Company shall deliver to the Company an irrevocable written instruction that so long as the Company's stock is held in trust by the Trustee, all dividends on the Company's stock shall be paid directly to Pace and not to the Trustee." (Emphasis added).

In connection with the public offering of its stock, Pace filed a Form S1 Registration Statement with the Securities and Exchange Commission which disclosed that on March 27, 1969, Pace acquired all of the capital stock of Wiese, Inc., and included financial data of Wiese, Inc., portions of the agreement between Pace and the Wiese, Inc. shareholders and other information with respect to the history and nature of services of Wiese, Inc. Both companies incurred substantial costs to develop the information required by the Securities and Exchange Commission.

After March 27, 1969, the organization and business operations of Wiese, Inc. were increasingly influenced by Pace. Pursuant to the March 27, 1969 agreements, the following significant personnel changes were made at Wiese, Inc.: The board of directors was increased

to seven members, including four Wiese, Inc. men and three Pace men. H. E. Wiese, Paul Anderson, and A. K. McInnis resigned as directors and were replaced by other Wiese, Inc. employees. Mr. Wiese and Mr. Anderson remained the principal officers of the corporation, but A. K. McInnis was no longer employed there. The March 27, 1969 agreements further provided for the creation of a two member "Supervisory Committee", whose unanimous consent was required for Wiese, Inc. to undertake certain major business activities. Mr. Wiese and Warren E. Askey, then President of Pace, were named as the two members of the Committee.

In connection with the March 27, 1969 agreements, Mr. Wiese and Mr. Anderson entered into employment agreements which would have had the

effect of reducing substantially the salary and bonus compensation that each of them had enjoyed prior to that date. For the fiscal year ended February 28, 1969, Mr. Wiese received remuneration of approximately $130,717. Subsequent to March 27, 1969, the salary to be paid to each man, pursuant to his new employment contract was as follows: Mr. Wiese was to be paid a salary of $31,200 per annum, for a term ending September 30, 1971; and Mr. Anderson was to be paid a salary of $26,000 per annum, for a term ending February 28, 1974. Each man was also to participate in bonuses payable under a new incentive compensation policy which was to be adopted with respect to Wiese, Inc. On the basis of the salaries provided under the employment contracts for Messrs. Wiese and Anderson, and further on the basis of the estimated earnings of Wiese, Inc.

for the fiscal year ended February 28, 1969, it was estimated that the total compensation (salary plus bonus under the proposed new incentive compensation policies) which each man would have received for that year would have been as follows: Mr. Wiese - $75,000, and Mr. Anderson - $70,000.

As a result of these changes, the compensation of these two men would have been more nearly commensurate with that received by other Pace executives. The reduction also was supposed to reflect their lessened workload and decreased responsibilities.

As part of the integration of the business activities of Wiese, Inc., and Pace, an engineering design group was established within the Wiese, Inc. organization. This group was created by the transfer, in July 1969, of Pace's

existing Process Design Group to Wiese, Inc. The transferred group consisted of a director of engineering and six project managers and engineers. These seven persons became employees of Wiese, Inc. and their salaries for the period beginning July 1, 1969, and ending December 31, 1971, were paid by Wiese, Inc. Any profits resulting from the work of the engineering group belonged to Wiese, Inc. However, although it was in all these respects integrated into Wiese, Inc., the group remained under the supervision of Mr. Broyles, who was at all times a Pace employee.

After the initial transfer of these seven employees, Pace supervised the hiring of an additional 40 persons for the engineering group of Wiese, Inc. These 40 people included draftsmen as well as civil, structural, instrument

mechanical, chemical and electrical engineers. It cost approximately $5,000 in addition to regular salary and benefits to hire each engineer. This cost was borne by Wiese, Inc.

The establishment of this engineering division necessitated the expansion of Wiese, Inc.'s administrative office and parking facilities and the relocation of the corporation's equipment, tool and repair shops. In making these adjustments on the basis of Pace's recommendations, Wiese, Inc. incurred costs of between a quarter and a half million dollars.

The transfer of seven engineers from Pace to Wiese, Inc. had the effect of reducing Pace's net income by approximately $30,000 annually.

Thus, on the basis of the March 27, 1969 agreements, the two companies incurred substantial costs in connection with the

proposed public offering of the Pace stock, the reorganization and expansion of Wiese, Inc., and the partial integration of the two businesses in contemplation of the final payment for Wiese, Inc. stock by Pace.

Around July, 1969, Pace encountered certain business problems which, along with the generally unfavorable stock market conditions then existing, decreased the likelihood that the contemplated public offering of Pace stock would have been successful. By September, 1969, it appeared that the price of the Pace stock would have to be reduced by as much as 50 percent if the offering were to be completed. Under the circumstances, Pace's management concluded that it would be unwise to proceed with the public offering. Therefore, on or about October 6, 1969, Pace officially notified Wiese, Inc. of its decision to withdraw

the public offering; and on October 13, 1969, Pace applied to the Securities and Exchange Commission for the withdrawal of its registration statement.

The adverse market conditions led the parties to modify the March 27, 1969, agreements in certain respects. First, on August 12, 1969, Pace and the Wiese, Inc. stockholders agreed to extend the Pledge and Trust Agreement, executed on Mary 27, 1969, until November 12, 1969, the date on which funds must be available to permit its required performance under the agreement. Second, on September 22, 1969, the same parties, with the consent of the Trustee, agreed to the First Amendment to both the Stock Purchase Agreement and the Pledge and Trust Agreement. This amendment, in substance, permitted Pace to withdraw the Cash Consideration it had deposited

with the Trustee on March 27, 1969. This withdrawal allowed Pace to save the interest expense it was incurring to borrow those funds. Finally, on September 26, 1969, the same parties agreed to an Addendum to the First Amendment. The Addendum was executed to clarify technical provisions and instructions to the Trustee contained in the First Amendment.

In spite of Pace's difficulties, both Pace and the Wiese, Inc. stockholders hoped that Pace would be able to raise the funds to complete payment for the Wiese, Inc. stock. Both sides still believed that the two companies could operate more profitably if they were part of a single corporate group. Moreover, each party recognized that substantial amounts had been spent and that additional costs would be incurred in separating the companies' already somewhat integrated business operations,

in the event that the sale was rescinded.

Therefore, several meetings between representatives of Pace and some of the Wiese, Inc. stockholders were held during the early part of October, 1969. On or before October 8, 1969, Messrs. Askey and Broyles, of Pace, met with the principal stockholders of Wiese, Inc., namely Mr. Wiese, Mr. Anderson and A. K. McKinnis. They discussed the problem of making payment for the stock in light of the fact that the public offering of Pace common stock would not take place. Several alternative plans were discussed. Eventually, the parties decided that the best way to permit Pace additional time to raise the money was for the Wiese, Inc. stockholders to grant Pace an option which would extend for approximately two years, during which time, Pace would raise the money needed to make the payment.

After this meeting, Mr. Wiese wrote the following letter, dated October 8, 1969, to Mr. Askey:

> "This letter is written to confirm the agreement with A. K. McInnis, Paul Anderson and the writer reached with you on the last visit to Baton Rouge.
>
> We (A.K., Paul and I) therefore made this counter proposal:
>
> 1. Wiese is to go back to its old method of operating, particularly the old bonus plan for its officers including the percentage proposed for the new officers elected during the period Wiese anticipated the completion of the merger with Pace.
>
> 2. Paul, A.K. and I would be re-elected to the Wiese Board of Directors* * *.
>
> 3. The profit or loss of the new H. E. Wiese, Inc. Engineering Department would be included in the total Wiese profit picture upon which the officers' Bonus and profit sharing are based.
>
> 4. In return for the above, all parties agreed that the price of Wiese stock to Pace and the method of payment to the Wiese stockholder would remain the same as shown on the Pledge and Trust Agreement Exhibit B and Exhibit C, provided the first downpayment could

> be made by Pace prior to October 15, 1971. The date of the first note payment and the interest rate was not mentioned in our verbal conversation. However, Wiese Stockholders request that the new agreement when consummated read the existing prime rate of interest on the date the agreement is signed instead of 6% agreed upon in the old document."

On October 24, 1969, Mr. Wiese and Mr. Askey met with the attorney for the Wiese, Inc. stockholders. They instructed him to prepare formal written instruments based on the agreement reached October 8, 1969, and confirmed by letter. To give effect to the conversion of the agreement to an option, the parties executed on November 6, 1969, an agreement designed to terminate the Pledge and Trust Agreement in order to relieve the Trustee of his fiduciary obligations and to permit the return of deposits and documents previously forwarded to the Trustee to the respective parties.

Six days later, on November 12, 1969, the parties reduced to writing the agreement reached on October 8, 1969 wherein Wiese, Inc. shareholders granted Pace an option to purchase all the issued and outstanding stock of Wiese, Inc. for and in consideration of $3,800,000. A portion of the consideration was to be paid in cash with the balance by a promissory note, secured in the same manner as under the March 27, 1969 agreements. Wiese, Inc. shareholders and Pace officers had negotiated for the option prior to November 6, 1969 and the agreement executed on that date was prearranged to set the stage for the option reduced to writing on November 12, 1969.

The option of November 12, 1969, was to terminate on October 15, 1971, unless the cash downpayment was made on

or before that date. The Wiese, Inc. shareholders agreed to give recognition to the option agreement by noting such on the shares of stock issued by Wiese, Inc. This option to purchase the stock of Wiese, Inc. was exercised by Pace by an agreement executed on October 18, 1971 but effective July 1, 1971, having been amended on June 30, 1971 relative to the amount of cash consideration.

However, apart from a few minor changes, the Business operations of the two companies in the Baton Rouge area went on as they had since the summer of 1969. Wiese, Inc.'s new engineering department continued working under the supervision of W. D. Broyles of Pace. And, although the Supervisory Committee established by the March 27, 1969 Stock Purchase Agreement no longer functioned as a formal entity, Mr. Wiese continued the practice of consulting with Mr.

Askey before Wiese, Inc. would undertake jobs in excess of half a million dollars.

During 1970 the Internal Revenue Service examined the corporate income tax liability of Wiese, Inc., for its three fiscal years ending February 29, 1968, February 28, 1969, and February 28, 1970. The examining revenue agent proposed a number of adjustments, one of which was the disallowance of the deduction claimed for certain "legal and accounting" fees paid by the corporation in connection with the planned acquisition of Wiese, Inc. by Pace. The agent recommended these deductions be disallowed on the grounds that, as of October 2, 1970 (the date of the Revenue Agent's report):

> "The proposed transaction has been amended and the option to buy extended but has not been abandoned. * * * Until the plans are abandoned, it appears all these expenses should be capitalized."

In response to the adjustments proposed by the Internal Revenue Service, Wiese, Inc. filed a letter of protest. This letter was prepared by Hannis T. Bourgeois, a Certified Public Accountant and was executed under penalty of perjury by Mr. Wiese, as president of the corporation. In that protest letter, Mr. Wiese objected to the examining agent's conclusion in respect of the legal and accounting fee deduction, with the following statement:

> "The Pace agreement terminated on November 6, 1969, as evidenced by a release executed to the bank bearing that date, and a letter from the bank to that effect dated December 2, 1970. After that transaction had been completed, terminated, and closed, on November 12, 1969, a new option agreement was entered into by and between the stockholders of Wiese and Pace, which had nothing to do with the previous negotiations."

The corporation's income tax liability dispute, which involved a number of items apart from the claimed deduction for the legal and accounting fees, was

eventually settled by agreement of the parties. In that settlement, it does not appear that any deduction was allowed for these fees.

REASON FOR GRANTING THE WRIT

I. This case merits review by this Court on certiorari because the norms for interpretation of legislative transitional rules are unclear in general, and the application of the particular transitional rule at issue herein, to the facts and the law of the State of Louisiana as to binding contracts, lacks liberality of interpretation and consequently deprives the taxpayer of the equitable result intended by Congress.

II. This case merits review by this Court on the certiorari because the decision of the Court of Appeals is unjust and substantially departs from the accepted and usual course of judicial proceedings and, therefore, calls for the supervision of this Court.

ARGUMENT

Background of Alternative Tax

Prior to the Tax Reform Act of 1969, Section 1201(b) of the Internal Code of 1954 imposed an alternative tax on all longterm capital gain which was applied by an individual taxpayer if it resulted in less tax than would be arrived at by subjecting such gain to tax at the ordinary rates.

Substantial changes in the manner of determining the alternative tax were effected by the Tax Reform Act of 1969. By enacting Section 511 of the Tax Reform Act of 1969, 83 Stat. 635, Congress increased the rates at which capital gains, which under prior law were to be taxed. The new provisions of the Code retained the 25 percent rate only with respect to the first $50,000 of an individual taxpayer's net long-term capital gains. To protect the

integrity of contractual rights, as well as to mitigate the impact of the changes, Congress enacted special transitional provisions which were intended to preserve the 25 percent rate irrespective of the $50,000 limitation for those gains realized and received prior to January 1, 1975, pursuant to binding contracts in effect on October 9, 1969.

As correctly stated by the U. S. Tax Court, Petitioners realized long-term capital gains substantially in excess of $50,000 in 1971 from the sale of their H. E. Wiese, Inc. stock. Thus, since these gains were realized after 1969, the portions thereof in excess of $50,000 would be subject to the new higher rates, unless they qualified as "subsection (d) gain(s)." Thus, this Honorable Court is requested to determine whether the gain in question satisfies the test of Sec. 1201(d)(1), i.e.,

"amounts received before January 1, 1975, from sales or other dispositions adopted by the Commissioner of Internal Revenue with respect to the new provisions of Section 1201 of the Internal Revenue Code of 1954 contain special rules for determining whether a sale resulting in longterm capital gain was made pursuant to a binding contract entered into on or before October 9, 1969, and which, for that reason, would constitute "subsection (d) gain." The special rules are set forth in Treas. Reg. 1.1201(f)(2)(i) and (ii) as follows:

> "(2) Special Rules. For purposes of subparagraph (1) of the paragraph-
>
> (i) A binding contract entered into on or before October 9, 1969, means a contract, whether written or unwritten, which on or before that date was legally enforceable against the taxpayer under applicable law. If on or before October 9, 1969, a taxpayer grants an irrevocable option or irrevocable contractual right to another party to buy certain property and such other party exercises that option or

> right after October 9, 1969, the sale of such property is a sale pursuant to a binding contract entered into on or before October 9, 1969.
>
> (ii) A contract which pursuant to subdivision (i) of this subparagraph constitutes a binding contract entered into on or before October 9, 1969, does not cease to qualify as such a contract by reason of the fact that after October 9, 1969, there is a modification of the terms of the contract such as a change in the time of performance, or in the amount of the debt or in the terms and mode of payment or in the rate of interest, or there is a change in the form or nature of the obligation or the character of the security, so long as the taxpayer is at all times on and after October 9, 1969, legally bound by such contract."

As previously stated above, to protect the integrity of contractual rights, the substantive changes of economic position in reliance upon mutual understanding, and to eliminate the unfairness of law changes affecting good faith transactions entered into prior to the effective date of Sec. 511 of Public Law 91-172, a transitional rule was adopted which was designed to

except from the repeal provision, sales or other dispositions under binding contracts in effect on October 9, 1969. This rule was applicable even though sales pursuant to such contracts were consummated at later dates. The rule was intended to preserve rather than destroy contractual rights.

Moreover, PL 91-172 was signed into law in December, 1969, while the change date adopted by House-Senate conferees was October 9, 1969, rather than July 25, 1969, as contained in the House version of the Tax Reform Act of 1969.

Petitioners respectfully submit that transitional rules in the tax law are rules of equity designed to avoid adverse impact on the good faith and bona fide negotiations and economic positions of taxpayers who may be affected by a change in law when such change is to take place on an arbitrarily selected

date within the taxable year that such legislation is adopted. Petitioners respectfully submit that application of transitional rules require an examination of all factors, facts, negotiations, agreements, economic positions, intent of the parties and general equity to a particular transaction; that the transitional rule should liberally be construed in favor of the taxpayer, and injustice or harsh consequences on the taxpayer should be avoided in all cases.

BUY-SELL AGREEMENT WAS NOT LEGALLY TERMINATED ON NOVEMBER 6, 1969

The Tax Court held and the Fifth Circuit affirmed that the November 6, 1969, document terminated the buy-sell agreement between the parties. The evidence clearly establishes that this document was designed to do nothing more than relieve the Trustee of his fiduciary obligations under the March 27, 1969

Stock Purchase and Pledge and Trust Agreement and to acknowledge that the Trustee had fulfilled its duties. In fact, the resolution which was passed by the Pace Board of Directors clearly dissolved only the Pledge and Trust Agreement and made no mention of dissolving the Stock Purchase Agreement. When placed in context with all of the facts and surrounding circumstances, the November 6, 1969 instrument did nothing more than remove the Trustee, and procedurally place the parties in a position to reduce to writing their agreement of October 8, 1969, to an option to pay for petitioners' stock within the two year period agreed upon. This instrument did not affect the agreement to buy and sell between the parties, nor did it terminate the agreements of August 12, 1969 and October 8, 1969. There was no change in the continuity of Pace's management and supervision of Wiese, Inc. affairs

following the execution of this agreement. In view of the extension of the original agreement to November 12, 1969, the oral agreement permitting a two-year extension, the substantial outlays by both parties and continuous Pace management, control and supervision of Wiese, Inc., it makes no sense that the parties completely terminated their agreement and then within six days, negotiated a new 3.8 million dollar agreement which was executed on the date the original agreement had been extended to. Negotiations of a new agreement within this six day interval would have been especially difficult in view of the fact that Mr. Askey, Mr. Wiese and Mr. Anderson did not meet at all during this time nor did the Board of Directors of Wiese, Inc. meet during this time to authorize negotiating a new agreement. The minutes of Pace's Board of Directors meetings held on November 10, 1969, are completely silent with

respect to the acquisition of Wiese, Inc. This is further evidence that the November 6, 1969, document did not change or terminate the oral and/or written buy-sell agreement between the parties. Finally, if the intent of the parties in executing the November 6, 1969 instrument was to completely terminate their agreement, it is not logical that the option agreement executed in writing on November 12, 1969 would incorporate by reference agreements which had been terminated. When placed in proper context, the effect and purpose of all agreements executed subsequent to March 27, 1969 was to permit Pace additional time to raise the funds with which to pay for the stock.

Taking all of the evidence (which is undisputed in any regard) into consideration, it cannot be disputed that

pursuant to Treas. Reg. 1.1201 (f)(2)(ii), the subsequent modifications in the terms of the original agreement did not cease to qualify it as a binding contract entered into on or before October 9, 1969. When the transfer was finally comsummated in 1971, it was pursuant to the original agreement modified in terms and conditions stemming from financial arrangement of the purchasers.

Promissory Estoppel Doctrine

A promise is binding upon the promisor if the promise has suffered some detriment in reliance upon the promise. A promise may become a binding contract by reason of a change of position by the offeree in reliance upon it. Corbin, Sec. 20; Central London P. Trust v. High Trees House, 1 K.B. 120 (1947); Devecmon v. Shaw, 14 A. 464 (1888); Young v. Boyd, 69 A. 33 (1908). The Restatement, Contracts, Section 90, provides:

> "A promise which the promisor should reasonably expect to include action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

The courts have included many actions and forbearances subsequent to the promise that were not, in fact,

bargained for. See King v. Thompson, 9 Pet. 204 (1835); Bigelow v. Bigelow, 49 A. 49 (1901); Haines v. Haines, 4 Md. Ch. 133 (1853); Freeman v. Freeman, 43 N.Y. 34; Young v. Overbaugh, 39 N.E. 712.

A leading case on detrimental reliance, Succession of McLellan, 144 So.2d 291 (4th Cir., 1962) is a suit for the reduction of a donation mortis causa of a testator by three forced heirs. The court wrote concerning the plaintiff's contention that the defendant was estopped to reconvene for items inconsistent with the inventory of the succession, the following which is in essence a paraphrasing of the language used by the Louisiana Supreme Court in the case of Porterie v. Gulf Mobile and Northern Railroad Company, 104 So. 711 (1938).

> "Where a person says or does something, or remains silent when he should speak, with the intention of influencing another to act to his hurt, and the other is injured thereby, such person will be held estopped to change his position when the other seeks to enforce his rights. The words and conduct must be of such a nature as would cause a person to take a course that he otherwise would not have taken but for such words and conduct. The words and conduct must have been designed to injure the other by misleading him on some material point. The other person must have acted to his injury by reason of the words and conduct." United States Fidelity & Guaranty Co. v. Putfark, 158 So. 9; Taylor Company v. N.Y. & Cuba Mail S.S. Co., 105 So. 379.

See also Evangeline Refining Co. v. Nunez, 153 So.2d 886, which follows the holding in Porterie, supra.

In the case before this Court, the uncontroverted facts clearly establish that the agreement between the Wiese, Inc. shareholders and Pace induced not one, but both parties to act in reliance of the agreement. The actions of Wiese,

Inc. include the expenditure of substantial amounts in the preparation of financial statements to furnish Pace for use in Pace's Prospectus filed with the Securities and Exchange Commission; expansion of its plant facilities to accommodate the establishment of a new engineering division, as well as the staffing thereof, placing Pace personnel on the Wiese, Inc. Board of Directors, exercising forbearance in the sale of Wiese, Inc. stock to third parties, exercising forbearance in the control of the stock or right to receive dividends upon placing the stock in escrow. In similar manner, Pace expended a substantial amount of money in the preparation and filing of their registration statement with the Securities and Exchange Commission, the payment of interest on the money place in escrow, and

suffered a loss of profits by transferring its engineers to Wiese, Inc. Under such circumstances, it is reasonable to conclude that substantial injustice could have been avoided only by enforcement of the obligations of the parties to the contract, and it is submitted that such an obligation falls within the equitable embrace of the legislative intent of the transitional rule.

Substance Over Form

It is well settled in tax matters that the substance of a transaction, rather than its mere form, is controlling. Weiss v. Stearn, 1924, 265 U.S. 242, 68 L.Ed. 1001, 445 S.Ct. 490; Gregory v. Helvering, 1935, 293 U.S. 465, 55 S.Ct. 266, 79 L.Ed. 596; Griffiths v. Helvering , 1939,308 U.S. 355, 60 S.Ct. 277, 84 L.Ed. 319; Commissioner of Internal Revenue v.

Court Holding Company , 1945, 324 U.S. 331, 65 S.Ct. 707, 89 L.Ed. 981. Notwithstanding the above, the Commisioner has taken a Procrustean approach to the complex facts of this case and has applied the transitional rule stricti juris, ignoring the equitable nature of the rule and the Louisiana law of obligations. This harsh position was acquiesced in by the Tax Court without evidence to support its findings, and is now affirmed by the Court of Appeals.

Petitioner respectfully argues that the substance of this judicial comment upon the nature, purpose and office of the transitional rule used by Congress in adopting legislative acts, and for equitable consideration.

Commissioner is Estopped from taking an Inconsistent Position

On November 4, 1970, the respondent issued a thirty (30) day letter to Wiese,

Inc. proposing certain adjustments to the corporation's federal income tax return for the period beginning on March 1, 1969 and ending on February 28, 1970. One of the adjustments proposed consisted of disallowing certain legal expenses in the amount of $15,664.69, which related to the sale of the corporate stock to The Pace Company. The corporation had deducted these expenses as ordinary and necessary expenses under Section 162 of the Internal Revenue Code of 1954. In the audit of H. E. Wiese, Inc. for the fiscal year ending February 28, 1970 (which includes the key dates in question), respondent took the position that such expenses were not deductible expenses, but rather, they were capital in nature because the stockholders of the corporation were under a binding agreement to sell their stock to The Pace

Company and the October 18, 1971 sale was an integral part of the earlier stock purchase agreement.

The Wiese, Inc. arguments were rejected by both the agent and the appellate conferee, both of whom contended that the agreement did not terminate on November 6, 1969, but, in fact, was continued in the subsequent agreement dated November 12, 1969, which finally culminated in the sale of the stock on October 18, 1971. Taxpayers respectfully submit that the facts surrounding the Pace acquisition of Wiese stock are the same now as they were in 1970 and that the payments made for the Wiese, Inc. stock on October 18, 1971 were part and parcel of a binding contract entered into pior to October 9, 1969. Commissioner's proposed deficiencies against the taxpayers are clearly based on a position totally

inconsistent with his position taken in 1970, which position was relied upon by the taxpayers in filing their income tax returns. Therefore, even assuming the Commissioner's proposed deficiencies are based on a correct interpretation of the facts, he should be estopped and barred from asserting such a position to the detriment of the taxpayers.

It is well settled that the doctrine of equitable estoppel, in proper circumstances, and with appropriate caution, may be invoked against the United States in cases involving Internal Revenue taxation. Simmons v. U. S., 309 F.2d 938 (5th Cir., 1962). Courts have held that the taxpayer should be permitted to invoke the doctrine of equitable estoppel against the Government in cases where (1) there has been a waiver of soverign immunity, both as to the tax liability

and as to suit, (2) agent whose conduct is relied upon to work an estoppel acted within the scope of his authority lawfully conferred, and (3) application of the doctrine would not bring a result that is either inequitable or contrary to law. It is inequitable to allow the Commissioner to change his interpretation of the same facts to the detriment of the taxpayers who relied on the original representation. See Smale & Robinson, Inc. v. U. S., 123 F.Supp. 457 (S.D.Cal. 1954); Schuster v. Commissioner, 312 F.2d 311 (9th Cir., 1962). In J. Eichelberger & Co. v. Commissioner, 88 F.2d 874 (5th Cir., 1937), the court stated " . . . whether that decision was right or wrong, the accredited officer of the United States made it. He cannot justly decide in 1930 that the corporation did not realize the loss and thereby collect

increased taxes, and in 1932 decide that it did realize the loss in 1930 and collect taxes again. The United States got the benefit of its agent's decision then and ought to abide by it now."

A properly executed closing agreement is conclusive and is binding upon the parties. Sections 7121 and 7122, Internal Revenue Code of 1954; T.D. Regs. 301.7121-1 and 391.7122-1; Botany Mills v. United States, 278 U.S. 282 (1929); George H. Baker, 23 T.C. 1021 (1955); Payson v. Comm., 166 F.2d 1008 (2CA, 1948); Guggenheim v. United States, 77 F.Supp. 186 (Ct. of Cl., 1948); Whayne v. Glenn, 114 F.Supp. 784 (W.D. Ky., 1954); Herber v. Jones, 103 F.Supp. 210 (W.D. Okla., 1951); an amended 870, Schafer v. United States, 19512 U.S.T. C. Paragraph 9372 (1951). cf. Sprott v. Reddell, 551 U.S.T.C. Paragraph 9242 (1955).

The respondent is estopped from taking an inconsistent position with regard to the same transaction as between the corporation and the shareholders of that corporation and the Court should hold them to the same consistency. See Orange Securities Corp. v. Comm., 131 F.2d 662 (5CA, 1942); Dixie Margarine Co. v. Comm., 115 F.2d 445 (6CA, 1940); Canada Dry Bottling Co. of Florida, Inc., v. Fahs, 109 F.Supp. 187 (DCSD Fla., 1952); Elizabeth Lewis Saigh, 36 T.C. 395 (1961); Vestal v. Commissioner, 152 F.2d 132 (DC Cir., 1945); Brown v. U.S., 86 F.2d 798 (6th CA, 1936).

For the foregoing reasons, it is submitted that the petition for certiorari should be granted to review the

Judgment of the United States Court of Appeals for the Fifth Circuit.

CONCLUSION

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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APPENDIX

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United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19

No. 77-2048
77-2049

Tax Court Docket Nos. TC-7406-74 and TC-7317-74

PAUL H. ANDERSON and FRANCES M. ANDERSON,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

****

HERBERT E. WIESE and MARY C. WIESE,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

****

Appeal from the Decisions of the Tax Court of the United States

Before SIMPSON, TJOFLAT and HILL, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record of the Tax Court of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decisions of the said Tax Court in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioners-appellants, pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

March 24, 1980

ISSUED AS MANDATE: APR 15 1980

Paul H. ANDERSON and Frances M. Anderson, Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

Herbert E. WIESE and Mary C. Wiese, Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

Nos. 77-2048, 77-2049.

United States Court of Appeals, Fifth Circuit.

March 24, 1980.

Appeals from the Decisions of the United States Tax Court.

Before SIMPSON, TJOFLAT, and HILL, Circuit Judges.

PER CURIAM:

Taxpayers appeal from a Tax Court ruling that they did not qualify under I.R.C. § 1201 for a twenty-five percent capital gains tax rate on their sale of stock. 1976 T.C.M. ¶ 76,362 (P-H). The narrow issue before us is whether the Tax Court erred in concluding that the taxpayers had not sold their stock pursuant to a binding contract in effect on November 9, 1969. We cannot say that the Tax Court's finding of fact on this issue is clearly erroneous or that it erred in holding that the alleged agreement was unenforceable. The Tax Court therefore is

AFFIRMED.

PUBLIC LAW 91-172
Section 511(b)
[pertinent to 26 U.S.C.1201(d)(1)]

"(d) SUBSECTION (d) GAIN DEFINED. For pusposes of this section, the term, 'subsection (d) gain' means the sum of the long-term capital gains for the taxable year arising--

"(1) in the case of amounts received before January 1, 1975, from sales or other dispositions pursuant to binding contracts (other than any gain from a transaction described in Section 631 or 1235) entered into on or before October 9, 1969, including sales or other dispositions the income from which is returned on the basis and in the manner prescribed in section 453 (a)(1),..."

Treasury Department Regulations
Section 1.1201(f)(2)

(2) Special rules. For purposes of subparagraph (1) of this paragraph--

(i) A binding contract entered into on or before October 9, 1969, means a contract, whether written or unwritten, which on or before that date was legally enforceable against the taxpayer under applicable law. If on or before October 9, 1969, a taxpayer grants an irrevocable option or irrevocable contractual right to another party to buy certain property and such other party exercises that option or right after October 9, 1969, the sale of such property is a sale pursuant to a binding contract entered into on or before October 9, 1969. The application of this subdivision may be illustrated by the following example:

(Examples omitted here.)